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sentence

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 UNITED STATES OF AMERICA,

New York, N.Y.

4 v.

16 Cr. 371 (RA)

5 BEVAN COONEY,

6 Defendant.

7 -----x

8 July 31, 2019

9 11:10 a.m.

10 Before:

11 HON. RONNIE ABRAMS,

12 District Judge

13
14 APPEARANCES

15 GEOFFREY S. BERMAN

United States Attorney for the
Southern District of New York

16 BY: REBECCA G. MERMELSTEIN

17 BRENDAN F. QUIGLEY

Assistant United States Attorneys

18 THE LAW OFFICE OF PAULA J. NOTARI

Attorneys for Defendant

19 BY: PAULA J. NOTARI

20 -AND-

O'NEILL and HASSEN

21 BY: ABRAHAM ABEGAZ-HASSEN

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(Case called)

MS. MERMELSTEIN: Good morning, your Honor. Rebecca Mermelstein and Brendan Quigley for the government. With us is Special Agent Nick Kroll of the FBI.

THE COURT: Good morning to all of you.

MS. NOTARI: Good morning, your Honor. Paula Notari, Abraham Abegaz-Hassen on behalf of Mr. Cooney, who is present in Court.

THE COURT: Good afternoon to all of you as well.

So, this matter is on for sentencing. You may be seated. Thank you.

In United States v. Cooney, Mr. Cooney was found guilty in June of last year of conspiracy to commit securities fraud and securities fraud. I denied his request for new trial in an order dated November 15th. You are all very familiar with that, of course.

In connection with today's proceedings I have reviewed the following submissions: The Presentence Investigation Report dated October 12, 2018; Mr. Cooney's sentencing memorandum dated July 8, with attached letters from friends and family as well as other exhibits, a supplemental letter of July 29th, and an additional letter I received from one of his friends just yesterday. And then I have the government's sentencing memorandum of July 22nd.

Have the parties received each of these submissions

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1 and am I missing anything?

2 MS. MERMELSTEIN: We do have them and you are not
3 missing them.

4 THE COURT: Thank you.

5 So, let's begin by discussing the presentence report
6 prepared by the United States probation office.

7 Ms. Notari, I assume you have read the presentence
8 report, have you not?

9 MS. NOTARI: Yes, your Honor.

10 THE COURT: Have you discussed it with your client?

11 MS. NOTARI: Yes.

12 THE COURT: Mr. Cooney, have you had enough time and
13 opportunity to review the presentence report and discuss it
14 with your attorney?

15 THE DEFENDANT: I have, your Honor.

16 THE COURT: Ms. Notari, I understand you have several
17 objections to the report so why don't we go through them. I
18 have, of course, read your papers carefully but tell me what
19 you want to highlight today. Why don't we start with the
20 offense conduct. Do you want to be heard further on that?

21 MS. NOTARI: No, your Honor. I think my post trial
22 motions, my sentencing memorandum, you know, really reiterate
23 our position regarding the nature of the offense and so I think
24 that, you know, as long as the record shows that we disagree
25 would be the recitation of the offense conduct.

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1 THE COURT: I think the record is clear in that
2 respect and I will say I don't think it is the appropriate time
3 now to relitigate Mr. Cooney's case. Even if it were the
4 proper time to do so, I will say that I continue to believe, as
5 detailed in my November opinion, that Mr. Cooney's receipt of
6 money from the WAPC account, participate in the Calvert
7 cover-up, purported lies that he told various entities about
8 subjects that were indisputably within the realm of his
9 knowledge, among other things, provides more than enough
10 circumstantial evidence to allow his guilty verdict to stand.
11 He, at the very least, consciously avoided learning that the
12 bond proceeds were being misappropriated and while I am not
13 going to respond to each of the assertions made in your letter,
14 I will say that I thought it was incorrect to assert, as it
15 does on page 3 of your July 29th letter, that the Court found
16 in the November opinion that Mr. Cooney did not know his
17 purchase of the second tranche of bonds was part of the
18 criminal scheme.

19 So, I will just say that. I am going to adopt the
20 factual findings in the report as they apply to Mr. Cooney and
21 I am going to adopt them in its entirety with respect to him.

22 Are there any other factual assertions that you object
23 to in the report?

24 MS. NOTARI: No.

25 THE COURT: Does the government have any objections to

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1 the presentence report?

2 MS. MERMELSTEIN: No, your Honor.

3 THE COURT: So, I adopt the factual findings in the
4 report with respect to Mr. Cooney. The presentence report will
5 be made a part of the record in this matter and placed under
6 seal. If an appeal is taken, counsel on appeal may have access
7 to the sealed report without further application to the Court.

8 So now why don't we talk about your objections to the
9 guidelines and, again, I am happy to rely on the papers but if
10 you want to be heard further, I will of course give you the
11 opportunity to be heard.

12 So, first with respect to the applicable guideline,
13 whether it's 2B1.1 or 2X1.1, would you like to be heard further
14 with response to that?

15 MS. NOTARI: Your Honor, I will rely upon my papers
16 for that.

17 THE COURT: So, for the record, Mr. Cooney contends
18 that his sentence level should be set under Section 2X1.1, the
19 conspiracy guideline, which requires any guidelines adjustment
20 to be established with reasonable certainty. I disagree, as
21 the guidelines make clear, 2X1.1 only applies when one has been
22 convicted of conspiracy and his or her specific offense as not
23 covered by another guidelines section. See 2X1.1C1.

24 In this case Mr. Cooney was both convicted of
25 conspiracy and of the specific substantive offense of

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1 securities fraud for which the applicable guidelines section is
2 2B1.1. In line with this guideline section I will therefore
3 evaluate any enhancements to his sentence under the typical
4 preponderance of the evidence standard and will be utilizing
5 2B1.1.

6 So, next I understand Mr. Cooney argues he could not
7 have reasonably been foreseen the victim's losses in this case
8 and that the total loss attributed to him by Probation is
9 therefore grossly inflated.

10 Do you want to be heard on this issue either?

11 MS. NOTARI: Yes, your Honor, I do, because your Honor
12 has just indicated is that my reading of your decision is
13 different what you are stating now so I do want to be heard on
14 that.

15 THE COURT: Sure.

16 MS. NOTARI: Well, your Honor has just indicated that
17 you do think that Mr. Cooney, by his actions, that somehow his
18 actions were different than Mr. Archer's actions and I do think
19 the evidence regarding Mr. Cooney and Mr. Archer is exactly the
20 same, in fact with regard to the purchase of the second tranche
21 of bonds. In fact, I think that Mr. Cooney in fact relied upon
22 Mr. Archer. The records show that Mr. Cooney purchased the
23 second tranche of bonds after Mr. Archer and that Mr. Archer,
24 there were e-mails, and the Government can confirm this showing
25 that there were e-mails between Mr. Cooney and some of

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1 Mr. Cooney's representatives like Clifford Wolf, for example,
2 who was Mr. Archer's attorney, and the fact that somehow one
3 can say that Mr. Cooney was in a different place is just -- I
4 can't make sense of that. The fact that the money that was
5 wired to Mr. Cooney somehow came from the WAPC account when
6 there was overwhelming testimony that this was a very
7 intentional deception upon Jason Galanis where he named Wealth
8 Assurance Private Client and Wealth Assurance Holding, that's
9 the dispositive evidence in this case which seals Mr. Cooney's
10 fate. Meanwhile, I have now pointed out an exhibit which
11 specifically shows that in connection with the wires -- first
12 of all, Mr. Cooney was completely open. There was no hiding,
13 there was no layering of identities the way the other
14 individuals in this case, like Francisco Martin, he always used
15 the same address. He emailed his accountants every single
16 wire, every document, everything went through his accountants
17 Fulton Management. And now we know. Now we have the evidence
18 from Eric Fulton and we have Steve Shapiro who vouched for the
19 reliability and the credibility of Eric Fulton and Fulton Meyer
20 and Alexis Gluckman and all the individuals who were conducting
21 business on Mr. Cooney's behalf. And we know that Steve
22 Shapiro who says they were credible and now we have Eric Fulton
23 who was questioned and subpoenaed by the government in
24 connection with this case in addition to other members of
25 Fulton & Meyer and he comes forward and says I reviewed the

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1 evidence in this case and I believe that he is an honest
2 person. Okay? I believe that he made mistakes and that he
3 trusted the wrong people. But, nowhere does the government
4 essentially dispute the fact that, you know, anything that I
5 have alleged with regard to Fulton & Meyer.

6 So, now we have the fact that Mr. Cooney sent all of
7 the wire information to his accountant and this was, you know,
8 I mean I think the Court said it many times in the opinion,
9 that this deal was just a very small deal in the grand scheme
10 of all of the deals that Mr. Cooney, Mr. Archer, and these
11 individuals were working on. I have submitted an exhibit of a
12 deal in 2012, Global prospectus that Devan Archer worked on
13 with Mr. Cooney and Jason Galanis and there is nothing
14 illegitimate about that deal. In fact, there is a news article
15 attached where Mr. Archer made substantial profits on that
16 deal.

17 The expectation that Mr. Cooney could possibly make
18 the distinction between Wealth Assurance Holdings and Wealth
19 Assurance Private Client is just not fair because he certainly
20 was not in any different position than Archer. In fact, he
21 was -- Mr. Archer was at Burnham. He was a very significant
22 person at Burnham. Burnham was the placement agent for these
23 bonds. But for the fact that Devan Archer put his name on this
24 and his credibility and convinced the BIT Board that Jason
25 Galanis wasn't involved, I'm led to believe that this would

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1 have never happened. But somehow Mr. Archer, who is closely in
2 a place to know all of this, he is a financial guru, Yale
3 graduate, he has worked for all of these boutique financial
4 firms, but somehow he can be misled but my client can't be
5 misled? When the cooperating witnesses said not even they
6 realized Hugh Dunkerley or Francisco Martin testified that they
7 didn't realize that this was a fraud until they actually were
8 able to see the fact that the money wasn't going into the
9 annuity and they had that, the ability to be so close?

10 We have an e-mail which I have now highlighted because
11 honestly, your Honor, at the filing of the post-trial motions
12 it is difficult to know what your Honor, to preview what your
13 Honor's thinking was and honestly, as a defense lawyer, you
14 never expect what was clearly the most fair decision I think I
15 have ever read from Mr. Archer but when I parse the evidence
16 and at this juncture I want to re-highlight the fact that the
17 e-mail, Mr. Cooney sends to his Fulton & Meyer, the people
18 managing his accounts and he says, you know, the wire is coming
19 from Wealth Assurance Holdings. It could not be more clear
20 that he thought it was Wealth Assurance Holdings and not Wealth
21 Assurance Private Client. He just didn't pick up on it. You
22 know? There were e-mails. Your Honor saw, I mean, thousands
23 and thousands of e-mails going back and forth relating to all
24 different indications and the fact that that detail is now the
25 pivotal detail, the dispositive detail which somehow makes him

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1 no different than Archer is just, I just respectfully, your
2 Honor, I don't think it is fair. I don't think it's -- I
3 just -- it is shocking and I think that, you know, trials are
4 not about character, unfortunately, and in this case, this case
5 was, there were the deviants, there were the -- Carrie Hearst
6 and Francisco Martin and there were people, Hugh Dunkerley and
7 people who were clearly part of the dark, sinister underworld
8 of Jason Galanis who were creating false documents and none of
9 those people, by the way, ever said that Mr. Cooney was
10 anything but a great guy. None of those people -- their
11 evidence against Mr. Cooney was exactly the same as Mr. Archer.
12 At best we have that Mr. Cooney attended a lunch. He was
13 always present at social gatherings. Nothing about talking
14 about bonds, nothing talking about anything in detail. And we
15 have the fateful phone call with Francisco Martin saying, you
16 know, at the last minute he remembered, after years of
17 cooperating with the government, that there was this phone call
18 which never has been documented and the Court did not put much
19 weight on that phone call saying that Mr. Cooney, you know,
20 received -- he gets this phone call and he says it is not about
21 the bonds, it is about Gerova which, frankly, is nothing
22 because no one is ever disputing that Mr. Cooney had something
23 to do with the bonds, that he purchased the bonds, and so did
24 Mr. Archer.

25 So, at best we have the same evidence and we have

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1 Mr. Cooney, anything that he did is so far removed from the
2 bonds. You know, the fact that he purchased, that he obtained
3 a loan from CNB Bank and now we have attached new evidence for
4 the Court to consider, which was something that the Court was
5 part of the pretrial motions but we actually, for reasons,
6 defense strategy reasons, never put that e-mail from Matthew
7 Fillman which says: Bevan, he sends Mr. Cooney -- Mr. Cooney
8 sends Matthew Fillman, which is consistent with -- there was
9 nothing unusual here. This is the same thing Mr. Cooney always
10 did. He was part of launching and promoting stocks and startup
11 companies and in this particular instance he was applying for
12 loans because sometimes it takes a while for the stock to value
13 and for him -- there is restricted stock and he can't sell it
14 so as he did in the past he had perfect credit, he applied for
15 a loan, and Matthew Fillman says, you know, quickly fill out
16 this financial statement, use big round numbers, not too
17 detailed. This becomes -- this financial statement becomes
18 again pivotal evidence in this case and clearly Steve Shapiro
19 and CNB Bank, this was a nothing like \$100,000 or I think it
20 was a \$200,000 equity loan that was based on Mr. Cooney's prior
21 credit and it had nothing to do with the bonds. The bonds were
22 illiquid bonds. Steve Shapiro repeatedly testified that these
23 bonds were not collateral for a loan. And so what changes when
24 Mr. Cooney applies for the \$1.2 million loan? He now has this
25 Code Rebel stock, just like Mr. Archer, and there is the

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1 restricted stock and he can't sell it so the bank reluctantly,
2 by their own admission, they -- this was a risky loan but based
3 on Mr. Cooney's prior record of perfect credit, and his
4 relationship with Fulton & Meyer who continues to stand by
5 Mr. Cooney, they granted the loan and what happened then was
6 something which was really out of Mr. Cooney's control. He was
7 deceived, he was misled, and the stock at the point that Jason
8 Galanis is arrested in Gerova, everything goes, to use an
9 adjective, everything falls away and his life, you know, his
10 name is -- the stock is now frozen and they can't sell the
11 stock and he can't pay back the loan. And then, shortly
12 thereafter that, he becomes involved and arrested by the FBI in
13 this case and he is just not able to pay back the loan. But,
14 the notion that somehow he lied about his ownership of the
15 bonds to get this loan -- and this relates back to it is just,
16 it is just not what happened and he was forthcoming and Fulton,
17 you know, Managers, they filled out the loan application. And
18 the same is true for Gerova -- I'm sorry, not Gerova -- 1920
19 Bel Air.

20 Again, the difference now verses the trial is now we
21 have put in more e-mails which we were not able to put in
22 during the trial which shows that Mr. Cooney was actively
23 trying to get a loan to purchase 1920 Bel Air, that there was
24 an e-mail from Jason Galanis saying thanks for taking the shot
25 for loaning them \$75,000. Again, Mr. Cooney did not make a

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1 single dollar on this, just like Mr. Archer.

2 Mr. Archer had every reason to be involved in these
3 deals given his position with Rosemont, Seneca Baja, given his
4 position with the financial conglomerate, given by how much he
5 stood to profit. I can't even begin to understand or know all
6 of the deals that Devon Archer was in but he was in a position
7 to profit and Mr. Cooney put \$400,000 of his own money, every
8 deal he did was his own money. And in the end, he was the only
9 one putting his own money into these deals. Francisco Martin
10 didn't do that; Hugh Dunkerley. He was the only one. And to
11 think that he put all of his money into these deals and at the
12 end he was left not only with nothing but his entire world has
13 fallen apart. He was bankrupt, his wife left him. And so, you
14 know, it all comes down to this -- and I want to briefly go
15 back to the 1920 Bel Air evidence.

16 The 1920 Bel Air evidence we have included now in the
17 record for the Court's consideration an exhibit, I believe it
18 is H, the fact that there was an appraisal done for 1920 Bel
19 Air and the reason why that didn't go into evidence is because
20 we had trouble -- we had trouble verifying the reliability but
21 the government -- I mean, it was part of the e-mail that this
22 particular agency did an appraisal, that Mr. Cooney did an LLC
23 check, that Mr. Cooney, Fulton was actively looking for a loan
24 for him, that there was an e-mail to Cohen which is a
25 nationally reputable company that they were looking for a

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1 mortgage for him. And Hugh Dunkerley, he didn't dispute the
2 fact that this was all -- he never said, oh, this was part
3 of -- that Mr. Cooney was somehow the straw buyer for 1920
4 Bel Air. Yes. Mr. Cooney had good credit and Mr. Cooney --
5 and, your Honor, in fairness, your Honor acknowledged and the
6 fact that it was okay for Mr. Archer to believe that he was
7 going to be involved in the New York condo and again put his
8 name Archer Diversified on that and there were e-mails between
9 Jason Galanis and Devon Archer which specifically talked about
10 the WLCC bond and the proceeds which was much closer to than
11 this remote deal with 1920 Bel Air that never happened. It
12 never even happened. Mr. Cooney was going to -- I mean talk
13 about personal relationship, it is the same personal
14 relationship that Archer had with Cooney, with Jason Galanis,
15 and now Mr. Cooney and somehow it is being viewed in a
16 different light.

17 The other thing I want to mention is this notion, you
18 know, Matt Schwartz is very, very good. He is very, very
19 clever and he is very good and he is probably the best lawyer
20 that many of us will ever see and he was very effective in
21 convincing your Honor that somehow Mr. Cooney was part of this
22 inside world stepping on poor little Devon Archer. But, I am
23 hoping that the letters -- the letters that we have submitted,
24 the Court has viewed Mr. Cooney up until this point --

25 THE COURT: I just want to be clear, nothing

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1 Mr. Schwartz said with respect to Mr. Cooney had any effect on
2 my decision.

3 MS. NOTARI: Okay, I understand. I am just saying the
4 strategy he used with regard to the draft and recording and the
5 other e-mail that somehow furthered the narrative that
6 Mr. Cooney was, you know, using Devon Archer as a show pony and
7 I would just reiterate that we have included e-mails where it
8 was very -- and the government actually, you know I think it's
9 their position too, according to these e-mails, that this was
10 the nature of the relationship that they were using Devon
11 Archer, his reputation, his preppy smile, his cache, his Yale
12 degree, and his relationship with Hunter Biden and Chris Heinz
13 to get -- to further for the financial conglomeration and there
14 was nothing -- there was nothing -- the fact that somehow this
15 person Devon Archer, given his stature, could be taken or by
16 Mr. Cooney who didn't graduate from college who was just a
17 passive investor who is not making a single intelligent
18 comment -- no offense, Mr. Cooney -- on any of these e-mails,
19 is just preposterous. And the reason why I think the
20 letters -- the many letters that we have submitted on
21 Mr. Cooney's behalf I would think they -- and I would let your
22 Honor know that these were not e-mails that were directed.
23 These were e-mails that came to me in a very natural fluid way
24 and shockingly, the comments were so consistent in who
25 Mr. Cooney is. And I focus on the letter yesterday from Dan

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1 Burrell because Dan Burrell is the person that introduced
2 Mr. Cooney to Devon Archer. And that was during the John Perry
3 presidential campaign and Mr. Archer and Dan Burrell were
4 working together and the introduction was made and Dan Burrell
5 who went on to be the leader, the CEO of Rosemont Salisbury
6 Capital Management, this was a company that where Devon Archer
7 was a managing partner and Chris Heinz was a managing partner.
8 So now, at the sentencing of Mr. Cooney, Dan Burrell writes a
9 letter on Mr. Cooney's behalf.

10 You know, these are people, the most legitimate people
11 in the country, some of the most successful people in the world
12 and, you know, it makes sense that a lot of people would say --
13 Eric Fulton -- I am not getting near that federal case. I am
14 not writing a letter. I am not standing by and vouching for
15 you. But, he has come out and said, no, I am going to write a
16 letter because this is not Bevan Cooney. This is not who he
17 is. This is not his character. And that has to, you know,
18 that has to count for something. The fact that so many people
19 have said this is inconsistent.

20 There is numerous letters of individuals who know
21 Mr. Cooney and recognize the manner in which he writes. He is
22 very fun, yes, he likes to exaggerate, he likes to make the
23 joke when he can and show pony is just -- and his Montana
24 style, it is just funny. Devon Archer is a show pony. He is
25 beautiful, he is talented, he is smart. He is an unusual

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1 person and he is always tan and glowing and so, you know, in
2 Bevan Cooney's world, show pony is a good word and somehow that
3 word is now, again, it has just been, it is just this world
4 where somehow Mr. Cooney, who was the lowest man on this totem
5 pole, he was the lowest person in this case, and I think the
6 government will -- I will give them a chance to comment on
7 this -- that Mr. Cooney was the least culpable person on this
8 indictment. And I think that they would agree that the
9 evidence against Mr. Archer is far more significant and is
10 related to the bond than Mr. Cooney and now we are in this
11 position where the exact same evidence -- and your Honor has
12 indicated, you know, that repeatedly in this decision -- that
13 the evidence is very similar. Your Honor indicates that there
14 was nothing wrong with the roll-up plan, that the pursuit and
15 the business partners acquired numerous legitimate companies.

16 Your Honor has indicated that this was a tangled web
17 of related transactions involving legitimate companies. Your
18 Honor has indicated repeatedly that there was replete evidence
19 of Jason Galanis, that he was intentionally deceptive rendering
20 him a unaware of various aspects of his legal conduct and that
21 he specifically -- he specifically created these false
22 companies with similar names to deceive people. And, in fact,
23 your Honor relied upon Mr. Cooney's e-mail asking what do we
24 get to do with the 15 million as somehow evidence of Devon
25 Archer's innocence.

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1 So, it is perplexing that we are in such a different
2 position and the other evidence relating to -- I mean,
3 certainly Mr. Archer had intentioned Calvert and somehow the
4 fact that Hugh Dunkerley testified they created Calvert and
5 didn't tell anybody. The only person that knew about this was
6 Gary Hirst, Hugh Dunkerley and Jason Galanis, but somehow the
7 fact that, you know, Mr. Cooney -- your Honor, I understand the
8 Court's decision as far as perhaps the latter conduct. I just
9 still don't understand how the Court's decision could be that
10 Mr. Cooney's actions somehow made him knowledgeable that the
11 bond was fraudulent when lawyers and experts and everyone,
12 including your Honor, has said that -- I think your Honor's
13 decision was specifically the e-mails involving Jason Galanis,
14 Mr. Cooney, and Mr. Cooney were facially innocuous, at best,
15 most naturally subjected to innocent interpretations.

16 So, I don't understand what gets us to his knowledge
17 of the bond. The mere fact that this money came from an
18 annuity called Wealth Assurance Private Client, that he clearly
19 thought was Wealth Assurance Holdings. And the significance of
20 this is because, all things put aside, we are at sentencing and
21 the question here, which is really the dispute, is what is the
22 loss. What was the foreseeable conduct? What was the actions
23 that were jointly undertaken? And by virtue of your Honor's
24 comment that somehow suggests that Mr. Cooney was in on this,
25 this deal to make this fraudulent bond; I don't even know how

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1 that's possible.

2 If your Honor thinks that the purchase of the second
3 tranche of bonds by Devon Archer was innocent then how,
4 suddenly, does his conduct, which is exactly the same which is
5 weeks later and, quite frankly, Michelle Morton, months after
6 the purchase of the second tranche of bonds, she doesn't even
7 know who Bevan Cooney is. And clearly in that e-mail, the text
8 message string between Jason Galanis and Michelle Morton,
9 they're talking about -- he is pimping out Mr. Cooney because
10 he has relationships to rich people which is exactly what Jason
11 Galanis does. He is talking about Kevin Washington, the
12 billionaire and now we have a view to Jason Galanis and his
13 strategy and what he does. And he was using Mr. Cooney just
14 like he was using Mr. Archer. There is no difference.

15 Mr. Cooney's connection to all of this, and it is
16 undisputed, is that he puts people together and he puts
17 business deals together, he puts high net worth people
18 together, and when he puts these deals together he doesn't play
19 a very detailed sophisticated role and the academics of it, it
20 is just he puts high net worth together. He has an incredible
21 group of friends who are friends from all different levels.

22 Today in this courtroom are two people who wrote
23 letters on his behalf; we have Eugene Brennan and his brother
24 James Brennan and both of these individuals wrote very, very
25 detailed letters about who Mr. Cooney is. And these are not

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1 rich, powerful people. Eugene is a fire fighter in Rockaway
2 Beach. He wrote the Court --

3 Eugene, could you just stand up?

4 He wrote the Court a letter about how he had a
5 lucrative position on Wall Street and after September 11th, he
6 was so moved by the dedication of the people and the fire
7 fighters that were lost, that he decided that he wanted to
8 change his career and he became a fireman. And who was there
9 by his side? A person he had known for, at the time, close to
10 10 years but Bevan Cooney, who convinced him to leave his
11 lucrative job and go where his passion was, his fire fighting.

12 THE COURT: Thank you for being here today.

13 MS. NOTARI: Thank you.

14 And James Brennan, Eugene's brother, who also has
15 known Mr. Cooney for 25 years, he was the best man at his
16 wedding and, again, another telling story of Mr. Cooney, how
17 when Mr. Brennan was in a personal crisis and he was struggling
18 with addiction, Mr. Cooney personally drove him to the Betty
19 Ford Center for treatment.

20 This is, again, the government has minimized the
21 importance of these many letters and all of this significant
22 charitable and spiritual work that Mr. Cooney does but these
23 individuals are not powerful people like Mr. Burrell but
24 they're still people that Mr. Cooney has forged incredible
25 friendships with and he has been by their side and, in fact,

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1 Mr. Brennan is very involved in charity work, he had a party --
2 a charitable event last night and Mr. Cooney, he indicates in
3 his letter, was personally responsible for helping him raise
4 funds after Hurricane Sandy that tore apart Rockaway Beach.

5 So, Mr. Cooney, his lifeline in life are his friends
6 and his family. That's who he is. He is all about -- he is
7 not about money. He is not about greed. He is about -- his
8 pulse beats through his friendships and the good that he can do
9 and he was, by his own admission he used poor judgment, just
10 like Devon Archer did. Devon Archer lied to the BIT Board. He
11 lied to the BIT Board because he believed in the deal. Like,
12 he lied to the BIT Board because he knew that Jason Galanis had
13 an unsavory past and Mr. Cooney knew Jason Galanis from his
14 early years. You know, they met in San Diego through mutual
15 friends and then for 10 years he had nothing to do with Jason
16 Galanis and people will tell you, everyone, much like the Court
17 and we heard, people had different views of Jason Galanis.
18 And, you know, maybe some people would have stayed away from
19 him but when he came back into his life was extremely
20 successful, he had the house in Bel Air, he was friends with
21 Jason Sugarman and Steven Sugarman and it just seemed all of
22 these legitimate people.

23 I mean anyone who is in business with Jason Sugarman
24 and Steven Sugarman would not question the legitimacy. I mean,
25 these are people that are so legitimate and Mr. Cooney

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1 re-evaluated Jason Galanis and Mr. Archer, all of them gave him
2 a chance because they were so excited by this financial
3 conglomeration. And everyone was, it is undisputed, everybody
4 was deceived by Jason Galanis -- the WLCC, all of the lawyers,
5 Tim Anderson, these are the biggest law firms in the country,
6 the most reputable law firms in the country -- everyone. And
7 Mr. Cooney was no different. He trusted in the legitimacy of
8 all of these individuals and that's really the only thing the
9 Crafton reporting says. The Crafton reporting said
10 specifically, the keys to these deals and what I am doing now
11 is land myself with people a lot smarter than I am. Devon
12 Archer, in particular. I have 10, 12 years' relationship with
13 him. He an ex-lacrosse player. He is a great dude. Do you
14 know him from Montana? I met him out in L.A. when he was
15 working with John Carey's presidential campaign 12 years ago
16 through Dan Burrell. I don't know if you know Dan Burrell.
17 Again, this is the telling of the truth, that he met through
18 Dan Burrell. And now we have a letter from Dan Burrell. Chris
19 Heinz is his best friend from college, you know, the Heinz
20 family. So, you have these layers of legitimacy with all the
21 deals we are doing now. Know what I'm sayin'? So if you went
22 to him he is not afraid. Like all of us if you believe in the
23 deal and the people that are on the deal, you will do the deal.

24 So what is the downside of this reporting? Comments
25 of a show pony. That's what brilliant Matt Schwartz has

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1 convinced -- he has done an effective job with some other
2 innocuous e-mail of somehow putting Mr. Cooney in this world of
3 people like Gary Hirst, slithering deviants who were -- and
4 this is where we are now.

5 So, it is just, it is a shock being -- your Honor, I
6 think my point, in going through this narrative with your
7 Honor, is we respect your Honor. We respect the due process
8 that you provided and the very careful decisions.

9 Unfortunately, from this side it does feel like the deceit is
10 continuing and it is just not -- it is just not -- we don't
11 believe it is fair because it is just an uneven view of the
12 evidence against Mr. Archer and Mr. Cooney and it is hard to
13 understand why there is such a different view and specifically
14 as for the loss. I am probably going to get to that point
15 right now if your Honor wants to go there.

16 THE COURT: Yes, if you want to respond to any of the
17 enhancements I am happy to hear you on that.

18 MS. NOTARI: So, in terms of the loss, the government
19 does not seem to make mention of any of the Court's findings in
20 terms of specifically the fact that the government is now
21 relying upon the fact that somehow, by virtue of the fact that
22 Mr. Cooney knew that there was investors and that he purchased
23 the second tranche of bonds, that that somehow translates into
24 guilt. Well, that's exactly the same true for Devon Archer and
25 the Court has viewed that that is not dispositive evidence.

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1 And it is very clear that Jason Galanis was trying to convince
2 Tim Anderson that there should be a new issuance of bonds and
3 he sends him an e-mail in August of 2000, I believe it was
4 right from Mr. Cooney made the second purchase of bonds so
5 right before August 2014. He is e-mailing Mr. Anderson a list
6 of the institutional buyers and he is doing the same thing to
7 Mr. Cooney; he wants him to purchase the second tranche of
8 bonds. And so, that's it. The fact that Mr. Cooney was sent
9 an e-mail that he knew that there were people purchasing the
10 bond, and that he knew that there was -- that somehow he knew
11 that there was, that they were doing this, is evidence of his
12 guilt that it was foreseeable in terms of the loss.

13 The Court has specifically, in your Honor's decision,
14 focused on thee things. You focused on the evidence concerning
15 the misrepresentations to CNB Bank. The second is your Honor
16 has focused on 1920 Bel Air. And the third is your Honor has
17 focused on Calvert. None of those things relate to the bond,
18 the victims. Clearly there were -- our position is there were
19 two conspiracies and that Mr. Cooney is not even charged in
20 Counts Three and Four which relate to the institutional
21 investors and the loss -- the law very clearly said that there
22 has to be a causal relationship between the defendant's fraud,
23 misstatements, and the loss to the victims. The cases that I
24 have outlined, and there are many, many more, specifically say
25 that it has to be jointly undertaken activity in furtherance of

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1 the conspiracy. There is cases which show in drug transactions
2 where, for example, if you are just participating in a one-load
3 drive and you only know there is 15 tons of marijuana, you are
4 not going to be responsible for the entire conspiracy because
5 it is not foreseeable.

6 So, here, at best, your Honor's decision regarding
7 Calvert or CNB Bank, it just doesn't link back to the loss of
8 the victims and the only way you get there is if somehow you
9 are finding that Mr. Cooney was, did design this fraud and was
10 part of it. And there is just no evidence of that. There is
11 no evidence that Mr. Cooney was anything but a passive investor
12 and the Court's decision has very carefully outlined, as far as
13 the evidence against Mr. Archer, why this was not dispositive
14 evidence.

15 So, our position is nothing the government says in
16 their brief. There is no case, nothing they cite links the
17 three acts that your Honor focuses on which convinced your
18 Honor that Mr. Cooney, at some point after the fact it seems,
19 joined the conspiracy, is not in furtherance of the loss. And
20 for that reason we really -- we do believe that the loss is
21 zero to six months. We believe that there is no way to tie
22 anything and there is cases which I have submitted of people
23 working in telecommunications firms where they're making --
24 where they know that other people are participating in fraud
25 but they're not part of it. That is just not good enough. The

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1 guidelines specifically say in relevant conduct, and I believe
2 it is 1B3.1 that it has to be in furtherance of and you have to
3 be aware of the fraudulent conduct and I don't believe the
4 government has proven that.

5 So, unless your Honor, we want to be more specific in
6 questions or evidence, we just completely disagree with the
7 guidelines and we don't believe, unless they can show loss
8 specific to victims, the victims in this case, we do not
9 believe that you can increase under the guidelines for the
10 number of victims. It has to be -- you specifically have to
11 show that those victims, but for the conduct of Mr. Cooney,
12 that those victims suffered loss and then there is an increase
13 for the number of victims. And here there has been nothing
14 said but my understanding was that the WLCC did not suffer any
15 losses. It was always -- the evidence at trial was very
16 specific. And Mr. Touger spent a lot of time on that with
17 witnesses that the deal was structured so that there was no
18 loss for the WLC and Raycen Raines testified to that and have
19 included that in my submission.

20 So, the other objection I have is of obstruction of
21 justice. For me that is problematic too because Mr. Cooney,
22 this is not a situation where Mr. Cooney was asked to produce a
23 document, specifically asked to produce a document and he
24 produced a fraudulent document. This was a mass production by
25 his attorneys and, clearly, if his attorneys knew that this was

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1 a false document they could have invoked the act of production
2 privilege which would have applied and that evidence would
3 never have gone into the trial, would not have been admissible.
4 He could have invoked that privilege. So, if he didn't produce
5 it, it is a double-edged sword. If he didn't produce it, it
6 would have been obstruction. The fact that he produced it is
7 obstruction.

8 So, there is nothing to say, there is no evidence in
9 the record that he had any specific knowledge but, again I
10 would defer to my papers on that and if --

11 THE COURT: Thank you.

12 Does the government want to respond to any of that
13 with respect to the guidelines calculation?

14 MS. MERMELSTEIN: Only if your Honor wants us to.

15 THE COURT: The only thing I really actually would
16 like to ask you is is there anyone you think is less culpable
17 than Mr. Cooney in this scheme and do you want to speak at all
18 to the minor role reduction? And speak to it in light of the
19 amendment to the rule.

20 MS. MERMELSTEIN: I think that there is no indicted
21 defendant who is less culpable than Mr. Cooney but that is in a
22 scheme in which there was an enormous amount of culpability to
23 go around and Mr. Cooney was involved, intimately, in an
24 enormous number of communications and transactions and actions
25 throughout a long scheme involving multiple bond transactions.

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1 He was involved in every single one and he played a critical
2 role. Right? In the absence of someone to misappropriate the
3 money, to recycle the money to buy bonds so that the thing
4 could keep going, to organize the purchase of the investment
5 advisors for the purpose of dumping these bonds into client
6 accounts, there could have been no scheme. And so, I don't
7 think that he is close to having a minor role. I don't think
8 the fact that you are less culpable in certain respects than
9 your co-defendants, the least culpable person does not get a
10 minor role as a matter of course.

11 THE COURT: The standard is now, pursuant to amendment
12 794, that there is relative culpability and it is by reference
13 to one co-participant in the case at hand and not, as the
14 Second Circuit had previously held, as compared to the average
15 participant in such a crime.

16 MS. MERMELSTEIN: I agree with that, your Honor, but I
17 think that the question is does someone have a minor role
18 relative to the co-defendants, not whether or not they were
19 sort of not the leader or not --

20 THE COURT: Are they substantially less culpable than
21 the average participant in the criminal activity at issue?
22 That's the standard now.

23 MS. MERMELSTEIN: And he is not.

24 THE COURT: Thank you.

25 So, let's first talk about the loss determination. As

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1 I stated earlier, the jury could, in my view, have reasonably
2 concluded that Mr. Cooney knowingly participated in the charged
3 scheme and he, thus, would have reasonably foreseen the
4 consequences of this scheme. As I noted in my November
5 opinion, it is possible that Mr. Cooney was unfamiliar with the
6 criminal object of the WLCC deal at its inception but that he
7 at least obtained the requisite knowledge during the course of
8 the fraud. I do think the government has proved that
9 Mr. Cooney knew the objectives of the criminal conspiracy at
10 the time he acquired the second tranche of bonds for \$5 million
11 from which he received nearly \$4 million in proceeds from the
12 WAPC account for the supposed purchase of Jason Galanis's home
13 in Bel Air which, in my view, is a critical piece of evidence.
14 And, as Mr. Cooney would have been aware at that point, the
15 \$20 million used to purchase the bonds had been misappropriated
16 from Hughes' investors. Furthermore, he would also have known
17 that \$16 million was misappropriated from the Atlanta client to
18 purchase the third round of bonds out of which he personally
19 received \$75,000. Thus, it would have been reasonably
20 foreseeable to Mr. Cooney that the victims in this case would
21 sustain a combined loss of between \$25 million and \$65 million.
22 So, I do believe that the 22-level enhancement and the offense
23 level is warranted.

24 Mr. Cooney also argues that the sentencing enhancement
25 for 10 or more victims should not apply here. As with the loss

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1 amount, Mr. Cooney predicates this argument on his claim that
2 he did not knowingly participate in the charged scheme. I have
3 already rejected that argument for the reasons stated today and
4 in my November opinion. The fraudulent scheme had 10 or more
5 victims which included the investment funds and the Wakpamni
6 Lake Community Corporation. Thus, I find a two-level
7 enhancement for 10 or more victims is appropriate in this case.

8 Mr. Cooney further asserts that an obstruction of
9 justice enhancement is unwarranted. I disagree. Again, as
10 detailed in my November opinion, Mr. Cooney knowingly provided
11 his financial managers with fraudulent documents related to
12 Calvert Capital in order to cover up the WLCC scheme. It is
13 also undisputed that Cooney then knowingly produced this
14 document to the SEC. As the sentencing guidelines application
15 notes make clear, the defendant commits obstruction of justice
16 where he produces false, altered, and counterfeit documents
17 during an official investigation. That is guideline provision
18 3C1.1, application note 4C. As a result, I find that a
19 two-level obstruction of justice enhancement is warranted.

20 Finally, Mr. Cooney argues that he is entitled to a
21 minor role reduction pursuant to Section 3B1.2 because he was
22 substantially less culpable than the average participant in the
23 Wakpamni bond fraud. I do think this is a close question but
24 after considering the relevant factors set forth in application
25 note 3C2 Section 3B1.2, I agree with Mr. Cooney. There is no

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1 doubt that he played an important role in the fraudulent scheme
2 having purchased the second tranche of WLCC bonds through
3 recycled proceeds but, as made clear by Amendment 794 to the
4 Sentencing Guidelines as I noted a moment ago, relative
5 culpability is now to be assessed only by reference to one's
6 co-participants in the case at hand and not as the Second
7 Circuit has previously held as compared to the average
8 participant in such a crime. That's a quote from United States
9 v. Allston, 899 F.3d at 149. Here I believe that Mr. Cooney is
10 substantially less culpable than the average participant in the
11 criminal activity at issue. That's 3B1.1, application note
12 3(a), and as the government acknowledged, there was no one
13 charged who is less culpable than he.

14 Excluding Devon Archer, five other individuals have
15 either pled guilty or were convicted at trial for their
16 participation in the scheme: Jason Galanis, John Galanis, Hugh
17 Dunkerley, Gary Hirst, Michelle Morton. It is undisputed that
18 Jason Galanis was the mastermind behind and orchestrator of the
19 fraud. As for John Galanis, he induced the Wakpamni tribe to
20 issue its bonds in the first place, something which was
21 undoubtedly the heart of the fraudulent scheme but which
22 Mr. Cooney took no part in.

23 With respect to Hugh Dunkerley, he served as the
24 placement agent for the tribal bond issuances and is the sole
25 managing member of the WAPC, roles which were pivotal in

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1 misappropriating the bond proceeds and, again, which is not
2 note which did not involve Mr. Cooney. Gary Hirst, too, played
3 a more significant role than Mr. Cooney.

4 As I made clear at his sentencing, Mr. Hirst, among
5 other things, set up the annuity provider that was supposed to
6 invest the bond proceeds on behalf of the WLPC, as well as the
7 bank account into which the bond proceeds were deposited.
8 Unlike Mr. Cooney, Mr. Hirst was also charged in all four
9 counts of the indictment.

10 It is also significant that Jason Galanis and John
11 Galanis retained more in criminal proceeds than Mr. Cooney, as
12 did Gary Hirst, with respect to an entity that he controlled.
13 Moreover, it is worth reiterating, as I stated earlier, that it
14 is unclear whether Mr. Cooney was knowingly involved in the
15 scheme from its inception, something that cannot be said for
16 many of these individuals.

17 I am not going to address Michelle Morton because she
18 has a motion pending and has not yet been sentenced, but based
19 on the other defendants' roles, I think Mr. Cooney was
20 substantially less culpable than the average participant.
21 Accordingly, because he did not plan or organize the criminal
22 activity or participate in the commission of the criminal
23 activity to the same degree or extent as his co-conspirators, I
24 find that a minor role reduction is warranted.

25 I should note that in imposing sentence I'm not going

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1 to consider his alleged participation in the Crafton fraud.
2 The government hasn't produced enough evidence at this stage
3 for me to conclude by a preponderance of the evidence that
4 Mr. Cooney was criminally liable in this matter. Unless the
5 government is seeking a Fatico hearing I am just --

6 MS. MERMELSTEIN: No, your Honor.

7 THE COURT: I am just going to not consider that
8 evidence.

9 So, for those reasons, I find that Mr. Cooney's
10 offense level is 31 so it is lower due to the two-level
11 decrease based on the minor role application, his Criminal
12 History Category is I, and his recommended guideline sentence
13 is therefore 108 to 135.

14 I will just note for the record that I also calculated
15 what Mr. Cooney's sentencing guidelines range would be if I
16 were to have concluded that he became knowingly involved in a
17 criminal scheme at a later time, namely when the third tranche
18 of bonds were issued from which he received \$75,000 in proceeds
19 from the WAPC account. If that were the case, the loss amount
20 foreseeable to him would be the \$16 million stolen from the
21 Atlantic client and there would not be the 10 or more victims
22 since the Hughes investors would be excluded from the total
23 amount of victims. This would have resulted in an offense
24 level of 27, which combined with the Criminal History Category
25 of I, amounts to a guideline sentence of between 70 and 87

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1 months.

2 As you all know, the Sentencing Guidelines that we
3 have been discussing were at one time mandatory. They are no
4 longer mandatory. Judges are no longer required to follow them
5 but judges must consider them in determining an appropriate
6 sentence and ensure that they have been calculated properly.

7 That range, of course as I said, is only advisory.
8 Courts may impose a sentence outside of that range based on one
9 of two concepts: A departure or a variance. The departure
10 allows for a sentence outside of the advisory range based on
11 some provision in the guidelines.

12 Ms. Notari, are you seeking a departure based on his
13 good deeds or are you really just seeking a variance?

14 MS. NOTARI: Your Honor, we are seeking both
15 departure, variance, but also specifically on his good deeds,
16 but also we believe that based on what the Court has just said,
17 I think that there is an argument that the loss calculation
18 overstates the reasonableness as it applies to Mr. Cooney and
19 his actions in this case. So, both.

20 THE COURT: I am denying those motions for departure
21 but I am considering those factors when imposing sentence and I
22 fully intend to do so.

23 With respect to his good deeds, I will note I do have
24 a host of letters. I have read all of them. They mean a lot
25 to me because they tell me who the person is who is sitting in

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1 front of me and what he has done in his life other than the
2 conduct, and so that is helpful for me.

3 So, as I said, I don't think that there is a proper
4 basis to grant either departure motion but I will consider
5 those arguments with respect to what the appropriate sentence
6 is.

7 Would the government like to be heard with respect to
8 sentencing or any of the victims other than what's been said
9 already?

10 MS. MERMELSTEIN: Your Honor, I think everyone in this
11 courtroom is amply familiar with the facts of the case at this
12 point. There is just no question that Mr. Cooney engaged in a
13 large scale fraud at the expense of victim pension funds and a
14 tribal entity for his own gain and the gain of his
15 co-conspirators. That he ended up with very little because
16 everything fell apart is really not the way to think about what
17 the goals of the conspiracy were, which was for all of these
18 defendants to share in the enormous profits they anticipated
19 from the rollup scheme they were going to fund on the backs of
20 longshoremen's pensions and the tribal entity. I think the
21 guidelines are appropriate here. The losses here are enormous
22 and it was obvious that they would be enormous given how much
23 money was being misappropriated and stolen.

24 The idea that Mr. Cooney was just friends with people
25 and encouraging and didn't know that this was a fraud I think

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1 has been properly rejected and where that leaves him is
2 standing before the Court for sentencing having wholly failed
3 to acknowledge any culpability in the scheme --

4 THE COURT: He has a right to go to trial, doesn't he?

5 MS. MERMELSTEIN: Of course he has a right to go to
6 trial but the trial is over, he stands convicted, and he
7 continues to assert that he is essentially a victim, and in
8 doing that has completely failed to take any responsibility for
9 the conduct he engaged in or for his efforts to cover that up
10 by submitting false documents in an effort to mislead the
11 investigation.

12 So, I think a very serious jail sentence is warranted
13 here. I don't think that the guidelines in this case overstate
14 the seriousness of the crime. I think it's wonderful --

15 THE COURT: Do you think he should get more than I
16 gave Gary Hirst? I gave Gary Hirst 96 months. Gary Hirst was
17 a lot older, he has health issues. I mean there were other
18 issues with respect to him, but.

19 MS. MERMELSTEIN: I think there are a number of
20 factors which distinguish Mr. Hirst, of course the government
21 sought a guideline sentence for Mr. Hirst.

22 THE COURT: Right.

23 MS. MERMELSTEIN: One, Mr. Hirst accepted
24 responsibility and pled guilty. Two, Mr. Hirst was already
25 serving a significant sentence that your Honor properly

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1 balanced when considering how much more time he needed to do.
2 That's not the case here. And, the government, in agreeing
3 that there is no less culpable defendant than Mr. Cooney, the
4 government does not view his role as meaning -- there is no one
5 who is beneath him, but neither do I think that he is so far
6 below everyone else that he is distinguished in that fashion.
7 And, it is admirable that he has friends who care about him and
8 who he has sought to help, but he is not in an extraordinary
9 category of good work --

10 THE COURT: Which is why I didn't grant the departure.

11 MS. MERMELSTEIN: -- that justify some significant
12 departure or variance.

13 So, I think for the reasons we set forth and I think
14 your Honor being familiar with the trial record here, think a
15 very serious sentence is appropriate and is, in fact,
16 commensurate with sentences that were imposed on the
17 co-defendants who have been sentenced, to date, when you
18 consider that those people accepted responsibility and all of
19 them, so far, were serving significant terms of incarceration
20 already that properly had to be accounted for in thinking about
21 how much more time was necessary.

22 THE COURT: Thank you.

23 Ms. Notari, is there anything else you would like to
24 say?

25 MS. NOTARI: Your Honor, yes.

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1 First, I would note that I think that I have included
2 most of this in my submission, but I just want to highlight
3 some things, specifically I want to highlight in terms of
4 Mr. Cooney's background, which again the government doesn't
5 view his background and extraordinary deeds particularly
6 important towards where the Court comes out in his sentencing.
7 I would note that that certainly is not where other Courts have
8 come out and I would note Judge Rakoff says, *surely the man is*
9 *to receive credit for the good he has done.* That basically
10 these decisions and the Second Circuit have said that a
11 person's character is -- and what they have done in the past is
12 absolutely key and crucial when you are considering sentencing
13 and that Mr. Cooney, the letters, and I understand your Honor
14 has read all of the letters but in terms of punishment,
15 deterrence, specific deterrence and the government alluded to
16 the fact that he hasn't learned his lesson, first, your Honor,
17 he did file a letter with the Court indicating --

18 THE COURT: Yes.

19 MS. NOTARI: -- how apologetic.

20 THE COURT: Yes. I have read his letter.

21 MS. NOTARI: In his life -- one cannot minimize what
22 his life has been like and what, in the four years since he has
23 been going through this, he has literally lost everything. His
24 ex-wife left him. He doesn't get to see -- he can't afford --
25 you know, he realizes that his ex-wife and children are better

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1 off in Ohio because that's where her family is; she remarried,
2 she is actually pregnant. But she -- the cruelty and the way
3 that she has limited his ability to see his children and the
4 fact that he has been unable to essentially work, that he is --
5 notwithstanding, he continues to be the most positive,
6 supportive person. He has literally, during these proceedings
7 his mother died of cancer and he managed to gather the family
8 and get her doctors and nurture his nieces Chloe and -- and he
9 has continued to do the same for his father. His father is
10 very frail, as indicated in the letter. The medical
11 documentation of all the numerous conditions he has, his father
12 literally has no one in Montana to care for him but Bevan. He
13 sees doctors on approximately two to three times a week and
14 there is no one else to care for him and in terms of specific
15 deterrence, and I think your Honor could be, likely feels that
16 you will never hear from Mr. Cooney again. But this --

17 THE COURT: I agree with that, actually. I don't have
18 a real concern about recidivism.

19 MS. NOTARI: He will live up to whatever conditions,
20 whatever the Court imposes. And in terms of --

21 THE COURT: And I think he is very different from, at
22 the very least, the Galanises that I have sentenced already in
23 that respect.

24 MS. NOTARI: And Gary Hirst, how can you compare?

25 First of all, there is two frauds and I understand he got 96

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1 months, but then your Honor gave him an additional three years
2 to run consecutive. So.

3 THE COURT: Which was part of the 96 months.

4 MS. NOTARI: But he was involved in two separate
5 frauds, and he was a lawyer, and there is no question in terms
6 of comparing the conduct that he made possible by virtue of his
7 being a lawyer and strategizing and that he was a crucial part
8 of the conspiracy whereas Mr. -- you know, here at this
9 sentencing we are looking at a lot of, you know, evidence which
10 that the Court characterized as consciousness of guilt. And
11 so, anything nearing a sentence of what Gary Hirst would be
12 incredibly tragic and unfair, particularly in light of the
13 disparity and the fact that I have included other sentences and
14 the national average of mean and median sentences in
15 nationwide, the Second Circuit, federal courts, that in terms
16 of -- in terms of what the sentences are -- and we are seeing
17 in my submission that these are 18, you know, anything in the
18 two-year range and none of these defendants, they're all far
19 more culpable than Mr. Cooney. I mean, if we look at these
20 cases, you know, they were all -- there was significant loss
21 but they were far more culpable.

22 And so, you know, in terms of going to trial, I mean I
23 think your Honor is at an advantage having seen the evidence in
24 this case because what the government depicted clearly in the
25 indictment and what actually they were able to prove is very

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1 different. And so, and your Honor had the ability to see the
2 evidence, and this was simply not a case that anyone could
3 plead guilty to because they weren't able to prove so much of
4 what they alleged and it was just not true. So, but
5 nevertheless, Mr. Cooney, I have included in terms of
6 disparity. And, you know, general deterrence is, the law is
7 very clear that it should not be the sole basis for imposing a
8 sentence and that specifically research has shown that
9 individuals, while it has a deterrent effect, the fact that a
10 person gets arrested is the deterrent effect and an increase in
11 severity of the punishments do not yield significant deterrent
12 effects.

13 So, your Honor, we urge the Court, respectfully, to
14 impose a sentence that is fair but Mr. Cooney is, he has been
15 punished for four years and, you know, a sentence that will
16 allow him to -- obviously, your Honor, we think probation with
17 community service is appropriate given our stance of this case
18 and the evidence and given the Court's decision with
19 Mr. Archer, but a sentence that will allow him to meaningfully
20 come back and be a functional person, be a father to his
21 children. He has not been able to meaningfully pursue any
22 custody with his kids because he just has no idea what is going
23 to happen in this case. I mean, his life has been on hold and
24 one can only imagine what it must feel like for these children
25 who he can't -- he doesn't have the money to really visit them

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1 frequently, his ex-wife limits that, and I just think that your
2 Honor will not see or hear from him. He will thrive and
3 continue to be the charitable person he has always been and
4 even more so.

5 You have the final say, we respect that but we really
6 just believe that a sentence of a lot of custody is just not
7 fair and just and it is not necessary and it doesn't serve --
8 it will serve no purpose beyond a general deterrence, perhaps.
9 It is certainly not going to specifically deter him and that's
10 just not been recognized as a sole basis for imposing a
11 sentence of significant jail time.

12 THE COURT: Thank you.

13 Mr. Cooney, I read your letter but is there anything
14 you would like to say today?

15 THE DEFENDANT: That's okay, your Honor. Thank you.

16 THE COURT: Thank you.

17 So, I am required to consider the advisory guidelines
18 range of 108 to 135 months as well as various other factors
19 that are outlined in a provision of the law that is 18, United
20 States Code, Section 3553(a) and I have done so. Those factors
21 include but are not limited to the nature and circumstances of
22 the offense and the personal history and characteristics of the
23 defendant. Judges are also required to consider the need for
24 the sentence imposed to reflect the seriousness of the offense,
25 promote respect for the law, provide just punishment for the

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1 offense, afford adequate deterrence to criminal conduct,
2 protect the public from future crimes of the defendant, and
3 avoid unwarranted sentencing disparities, among other things.

4 So, there is no real dispute in my view about the
5 seriousness of the crime and the harm that it caused to one of
6 the poorest Native American tribes in the country as well as
7 the clients of Hughes and Atlantic Pension Fund held for the
8 benefit of transit workers and longshoremen and housing
9 authority workers and city employees, among others. This crime
10 caused real harm to real people. Indeed, as I believe the
11 evidence established at trial, Mr. Cooney participated in a
12 scheme that stole more than \$40 million from these pension fund
13 clients and left the Wakpamni Lake Community Corporation
14 without money for economic development and owing more than
15 \$60 million on the outstanding bonds.

16 This is a serious crime and a serious sentence needs
17 to be imposed to reflect that seriousness and to promote
18 respect for the law and to provide just punishment, and to
19 afford adequate deterrence to others who may seek to engage in
20 similar criminal conduct. Deterrence, in my view, is
21 especially important in white collar cases.

22 I have also considered the need to avoid unwarranted
23 sentencing disparities. I would note that while Mr. Cooney's
24 sentencing brief and Ms. Notari today highlighted various
25 securities fraud cases in which defendants have received

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1 sentences of under 36 months, the fraud in this case was
2 considerable. I have also considered the roles of the various
3 individuals in this scheme. I sentenced Jason Galanis to 173
4 months, 60 months which was to run concurrent to the scheme in
5 the Gerova case; John Galanis got a sentence of 120 months, 48
6 of which was to run concurrent; and Gary Hirst got a sentence
7 of 96 months, 36 months to run concurrent.

8 Look. Every sentence is different and there are
9 different factors that must be considered for each person but
10 it is important that I consider the sentences in those cases,
11 and it is especially important that I consider that Mr. Cooney
12 played a comparatively smaller role in this scheme as compared
13 to his co-conspirators, as noted earlier, and did not retain
14 close to the amount of criminal proceeds that various other
15 individuals in the conspiracy did. I have also considered that
16 he has no real significant criminal history and I don't think
17 there is real cause to believe that he will recidivate.

18 Finally, as I noted earlier, I have read the many
19 letters about good deeds that he has done for friends and for
20 family and about who he is as a person. So, I have considered
21 all of that and I am ready to impose sentence.

22 Mr. Cooney, please rise. It is the judgment of this
23 Court that you be committed to the custody of the Bureau of
24 Prisons for a term of 30 months on Count One and Count Two, to
25 run concurrently to each other. That term of imprisonment will

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1 be followed by a term of three years of supervised release also
2 to run concurrently. I believe that this sentence is
3 sufficient but not greater than necessary to comply with the
4 purposes of sentencing set forth in the law.

5 You can be seated, if you would like.

6 I will just note for the record that even if the lower
7 guidelines range of 70 to 87 months that I discussed earlier,
8 assuming that he gained the requisite knowledge at a later
9 point in time, my sentence would have been the same and it also
10 would have been the same if I didn't apply the obstruction
11 enhancement. This sentence is significantly below both of
12 those, the guidelines range he would have been facing in either
13 of those scenarios.

14 I also want to say that a sentence, even of two and a
15 half years is a long sentence, particularly for an individual
16 who has never been charged or convicted of a felony offense
17 before.

18 I am going to describe the terms of Mr. Cooney's
19 supervised release. All standard conditions of supervision
20 shall apply. In addition, and I am not going to read them out
21 loud, Ms. Notari, unless you would like me to read them out
22 loud --

23 MS. NOTARI: Your Honor, when you are done I wanted to
24 ask for a few more things in the judgment.

25 THE COURT: Yes. Just let me finish the standard

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1 conditions.

2 So, the mandatory conditions I will read out loud.
3 You must not commit another federal state or local crime. You
4 must not unlawfully possess a controlled substance. You must
5 refrain from any unlawful use of a controlled substance. You
6 must submit to one drug test within 15 days of release from
7 imprisonment and at least two periodic drug tests thereafter,
8 as determined by the Court. You must cooperate in the
9 collection of DNA as directed by the probation officer. And,
10 you must make restitution in accordance with the law.

11 And then, just make sure to read again, I know you
12 said you read them, the standard conditions and comply with
13 them.

14 MR. QUIGLEY: Your Honor, if I may?

15 THE COURT: Yes.

16 MR. QUIGLEY: The PSR reflects that the old standard
17 condition 12, and I only know this because it came up in
18 another case, that that has been modified by a standing order.

19 THE COURT: That is correct, so consider this to be
20 modified by that standing order as well and thank you for
21 reminding me of that.

22 In addition, I am going to apply the special
23 conditions, the financial ones in light of the nature of this
24 case and in light of the restitution and forfeiture I am going
25 to impose. You must provide the probation officer with access

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1 to any requested financial information and must not incur new
2 credit card charges or open lines of credit without the
3 approval of the probation officer unless you are in compliance
4 with the installment payment schedule.

5 The probation department also recommends an outpatient
6 treatment program. Ms. Notari, do you think that is necessary
7 now?

8 MS. NOTARI: Your Honor, no, but we are asking for the
9 500-hour drug program so I think that would just be -- I think
10 that it is appropriate given that he does have his past and he
11 can certainly benefit from it but he hasn't -- there has been
12 no problems with that, so.

13 THE COURT: But you are asking for a drug treatment?

14 MS. NOTARI: Yes; at the jail.

15 THE COURT: The RDAP program?

16 MS. NOTARI: Yes.

17 THE COURT: I will make that recommendation but I
18 think if you are asking for that I am going to include the
19 outpatient treatment program as well because if he has an issue
20 that needs to be addressed, then it should be addressed on
21 supervised release as well.

22 MS. NOTARI: That's fine.

23 Well, I would just ask if there is a way that the
24 Court can structure the language so that it is within the
25 discretion of the probation officer and then it is not --

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1 THE COURT: I can do that. I just have to make sure I
2 am not seeding too much control to the probation officer.

3 MS. NOTARI: Yes.

4 MS. MERMELSTEIN: Your Honor.

5 THE COURT: Yes.

6 MS. MERMELSTEIN: I'm sorry.

7 We have no position on whether or not there should be
8 any kind of treatment with respect to a condition.

9 THE COURT: Yes.

10 MS. MERMELSTEIN: But, the idea that Mr. Cooney
11 doesn't need post-prison treatment and only wants eligibility
12 for a prison program that would allow him a benefit seems
13 inconsistent to me.

14 THE COURT: I agree, which is why I denied that
15 request. I completely agree with that, I think that seems
16 inconsistent and seems to indicate that there is an ulterior
17 motive. I get it. But, that being said, the Probation
18 Department made that recommendation for a reason in light of --
19 I will go back to the PSR -- in light of all of the substance
20 abuse issues that were noted in paragraphs 116 to 121 -- or
21 really to 120 and his history in this respect, and so that's
22 why I am making a recommendation. But, I agree with you.

23 I am going to just include the language that's
24 included here on page 37. It is that he will participate in an
25 outpatient treatment program approved by the probation office

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1 which program may include testing to determine whether you have
2 reverted to using drugs or alcohol. You must contribute to the
3 costs of services rendered based on your ability to pay and the
4 availability of third-party payments. The Court authorizes the
5 release of available drug treatment evaluations or reports
6 including the presentence investigation report to the substance
7 abuse provider.

8 Look. If in fact the probation officer doesn't think
9 he needs treatment anymore or is complying with treatment and
10 it is successful and you want to amend that condition, you can
11 write me a letter.

12 I decline to impose a fine in light of the significant
13 forfeiture and restitution orders that will be imposed.

14 I am imposing the special assessment of \$200 which is
15 mandatory and must be paid immediately.

16 Do you want to be heard, Ms. Notari, with respect to
17 restitution or forfeiture?

18 MS. NOTARI: Your Honor, I believe in my letter that I
19 filed on Monday we are objecting to the restitution.

20 THE COURT: All right.

21 MS. NOTARI: And so, for the reasons stated, we would
22 defer to our papers.

23 THE COURT: Understood.

24 With respect to restitution for the reasons stated
25 earlier, I believe the government has established that

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1 Mr. Cooney knew that Hughes Atlantic investment money had been
2 misappropriated and his restitution order should therefore
3 encompass these loss amounts. See United States v. Feomano,
4 721 F. App'x at 52. Accordingly, pursuant to the order of
5 restitution he shall pay \$43,785,176 in restitution to the
6 victims of the offenses charged in counts One and Two. His
7 liability shall be joint and several with that of the other
8 defendants in order to make restitution for the offenses in
9 this matter. The names, addresses and specific amounts owed to
10 each victim are outlined in the schedule of victims page which
11 will be filed under seal. As to the payment schedule, I am
12 going to adopt the payment schedule recommended in the
13 presentence report on page 38.

14 I also understand the government is seeking forfeiture
15 of \$9,527,000. It is true that Mr. Cooney only received
16 \$75,000 in illicit proceeds. Nevertheless, the Second Circuit
17 has made clear that forfeiture in criminal proceedings under
18 18 U.S.C. Section 981 includes illicit proceeds that have, at
19 some point, been under the defendant's control or the control
20 of his co-conspirators so long as the actions generating those
21 proceeds were reasonably foreseeable to the defendant. See the
22 Contorinis case, 692 F.3d at 147. Here it is undisputed that
23 during the conspiracy \$5,557,000 in bond proceeds was sent to
24 Mr. Cooney's bank account from Thorsdale which were, in part,
25 later used to purchase additional Wakpamni bonds, and

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1 \$3,895,000 was sent to his bank account from Wealth Assurance
2 Private Client Corporation which was eventually used to fund
3 the purchase of Valor Life. Thus, this money was, if only
4 temporarily, under his control and at the very least under the
5 control of his co-conspirators. So, for the reasons stated
6 earlier, it was also proven at trial that he was aware that
7 these proceeds were misappropriated from the Hughes and
8 Atlantic investors.

9 So, I think I have a restitution order, I don't have a
10 forfeiture order, but I will sign one in the amount of
11 \$9,527,000.

12 So, that's my sentence. Is there any legal reason,
13 other than the ones previously stated, that this sentence
14 should not be imposed?

15 MS. MERMELSTEIN: No, your Honor.

16 THE COURT: So, that's the sentence of this Court.

17 Mr. Cooney, you have a right to appeal your conviction
18 and sentence except to whatever extent you may validly waived
19 your right as part of your -- which you have not waived that
20 right. So, you have a right to appeal you your conviction and
21 sentence. If you do choose to appeal, the notice of appeal
22 must be filed within 14 days of the judgment of conviction. If
23 you are not able to pay for the costs of appeal, you may apply
24 for leave to appeal in forma pauperis, which simply means that
25 Court costs, just filing fees, will be waived. If you request,

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1 the Clerk of Court will prepare and file a notice of appeal on
2 your behalf.

3 Are there underlying indictments that need to be
4 dismissed.

5 MS. MERMELSTEIN: Yes, your Honor. The government
6 moves to dismiss the underlying indictments.

7 THE COURT: They are dismissed.

8 We need to talk about voluntary surrender date,
9 Ms. Notari?

10 MS. NOTARI: Your Honor, also, if your Honor can
11 recommend in the judgment the FCI Sheridan Oregon, which is the
12 closest BOP facility near Montana where his father lives so
13 that at least his father can drive with Mr. Cooney's partner,
14 who is here, and she would be able to drive his dad, they would
15 be able to visit him.

16 THE COURT: I will make that recommendation. It is
17 minimum security?

18 MS. NOTARI: It is minimum security.

19 THE COURT: I will make that recommendation.

20 MS. NOTARI: And you have already indicated the RDAP
21 program.

22 I would ask for 60 days, only because I am going to
23 try to facilitate that.

24 THE COURT: That's fine. 60 days is fine. So, why
25 don't we say October 1st he'll surrender to the facility to

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1 which he is designated on October 1st by 2:00 p.m. unless he
2 hears otherwise from the probation department his pretrial
3 service officer. Failure to surrender when required may result
4 in a warrant being issued for your arrest so please surrender,
5 as I know you will, on October 1st, by that time.

6 Are there any other applications, Ms. Notari?

7 MS. NOTARI: No, your Honor.

8 THE COURT: Thanks. We are adjourned.

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